ROGAYAH CHE MAT

v.

PP

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CRIMINAL APPEAL NO: MT(2) 41-5-1999]
29 OCTOBER 2000

CRIMINAL PROCEDURE: *Charge - Alteration or amendment of - Explanation of such alteration - Whether mandatory - Meaning of word 'shall' - Criminal Procedure Code, ss. 158(2) & 173(a)*

CRIMINAL PROCEDURE: *Charge - Framing of - Whether conviction founded on proper charge - Whether charge should be founded on punishment provision or definition provision - Penal Code, ss. 415, 417*

The appellant was charged for an offence under s. 417 of the Penal Code. She was eventually convicted and sentenced pursuant to an amended charge. In this appeal from the Sessions Court, two preliminary points were raised, namely: (a) the failure of the sessions judge to read and explain the amended charge to the accused as required by s. 158 of the Criminal Procedure Code; and (b) that the conviction was founded on a charge unknown in law. This was because s. 417 of the Penal Code was a punishment provision and the charge should have been based on s. 415 of the Penal Code.

Held:

[1] Whether the word 'shall' in a particular section is mandatory or directory depends on the facts and circumstances of the case.

[1a] Taking into account the facts and circumstances of this particular case, s. 158 of the Criminal Procedure Code did not make it mandatory for the judge to have explained the charge to the accused.

[2] In any event, the omission to explain the charge was a curable irregularity by virtue of s. 422 of the Criminal Procedure Code, with the result that the accused had not been deprived of a fair trial. With no failure of justice having been occasioned, there was no ground for setting aside the sessions judge's decision.

[3] Section 415 of the Penal Code is a definition section and not a substantive section under which a person may be charged. Section 417 of the Penal Code provides for the punishment of simple cases and the prosecution is not prevented from charging an accused person for a case of simple cheating.

[Preliminary objections dismissed.]

Case(s) referred to:
Chai Chin Fatt v. PP [1984] 2 MLJ 84 ***(dist)***
Chua Ah Gan (f) v. PP [1958] July liv ***(refd)***
Hari Ram Seghal v. PP [1981] 1 MLJ 165 ***(refd)***
Hee Nyuk Fook v. PP [1988] 2 MLJ 36 ***(foll)***
Jaafar Abu & Anor v. PP [1988] 2 MLJ 363 ***(refd)***
Khoo Kay Jin v. PP [1964] 30 MLJ 22 ***(refd)***
Lee Swee Tee v. PP [1960] 26 MLJ 161 ***(dist)***
PP v. Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 652 ***(dist)***
Pulukuri Kotaya & Ors v. Emperor [1947] AIR PC 67 ***(refd)***
Singah Mohamed Hussin v. PP [1973] 2 MLJ 109 ***(refd)***
Subramanian & Anor v. PP [1976] 1 MLJ 76 ***(dist)***
Tong Ke Kee v. PP [1941] 10 MLJ (FMSR) 139 ***(refd)***
Wong Poh Ching v. PP [1959] MLJ 160 ***(foll)***
Yeo Sim Huat v. PP [1961] 27 MLJ 328 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 158(2), 173(a), 422
Penal Code, ss. 415, 417, 420

Other source(s) referred to:
Laws of Crimes, Ratanlal
Penal Law of India, Dr Hari Singh Gour, vol IV, pp 3516, 3524

For the appellant - Karpal Singh & Hj Mohamed Apandi Ali; M/s Karpal Singh & Co; M/s Apardi Ali & Co
For the respondent - Rosli Sham DPP

Reported by Mariette Peters-Goh

JUDGMENT

Suriyadi Halim Omar J:

The appellant was charged before the Sessions Court for an offence under s. 417 of the Penal Code, and was eventually convicted and sentenced to three years imprisonment on 10 January 1999, pursuant to an amended charge. This amended charge (P28) reads:

Bahawa kamu diantara 31hb. Disember 1990 hingga 7hb. Mei 1991 di Pejabat Tanah Jajahan Pasir Mas, Pasir Mas, negeri Kelantan telah menipu Tengku Azmi bin Tengku Jaafar (Kp. No. 610482-03-5457), Tengku Amran Shah bin Tengku Ibrahim (Kp. No. 6119121) dan Nik Anuar bin Nik Abu Bakar (Kp. No: 4729630) yang merupakan pegawai-pegawai dan kerani di pejabat tanah berkenaan dengan niat yang curang memperdayakan mereka dengan cara menyembunyikan fakta sebenar berkaitan kedudukan suratan hakmilik 75 lot tanah di Mukim Gual Nering (sebagaimana dalam lampiran) yang diserahkan kepada mereka untuk tujuan pendaftaran pindah milik yang mana kamu ketahui suratan hakmilik berkenaan sebenarnya berada dengan pihak pemegang cagaran sebagai cagaran kepada pinjaman yang dibuat oleh kamu dan dengan jalan demikian telah mendorong secara curang pegawai dan kerani berkenaan untuk membenarkan pindah milik 75 lot tanah tersebut dibuat kepada Pesuruhjaya Tanah Persekutuan yang mana mereka tidak akan melakukannya jika tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 417 Kanun Keseksaan.

Being dissatisfied with the decision of the learned Sessions Court judge an appeal was promptly filed. When the matter made its first appearance before me, the judgment was yet to be prepared by her, hence resulting in it being postponed. After several frustrating postponements, solely on the similar ground of the unavailability of the grounds of judgment, parties to the proceedings agreed that the hearing be converted into a review (see *Jaafar bin Abu & Anor v. Public Prosecutor* [1988] 2 MLJ 363; *Hari Ram Seghal v. Public Prosecutor* [1981] 1 MLJ 165). I acquiesced to the prompting and on 17 September 2000 the revision proceedings began. Unfortunately, before I could start off with the hearing proper, the appellant requiring immediate attention posed two preliminary points. The first issue, in a gist was the ventilation that the trial was null and void when the court had failed to explain the charge as required by s. 173(a) of the Criminal Procedure Code. This supposed procedural non-compliance of a mandatory provision could be appreciated by reading this provision, which reads:

173. The following procedure shall be observed by the Magistrates in summary trials:

(a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried (emphasis supplied).

(b) ...

Having perused the records of appeal, I was absolutely at one with the contention of the appellant, as reflected by its dearth in the records, that the omission to explain was not a mere typographical error, but an obvious

failure on the part of the learned judge to fully comply with the relevant provision. To appreciate this latter sentence, it is of paramount importance that I touch on the immediate events that transpired prior to the reading of the second and final amended charge ie, the charge under which the appellant was found guilty. At p. 103 of the Records of Appeal it is clearly imprinted the sentences *"Pertuduhan dibaca. Pertuduhan difaham. Masih minta dibicara"*, loosely interpreted as "Charge read. Charge understood. Still claimed trial". It is conspicuously obvious, to say the least, that the charge was never explained to him. Had that impugned statement stand on its own I would not have much difficulty in justifying the omission as, as remarked above, a typographical error. As it were, the Records of Appeal were littered with such omissions, as reflected by the minutes of the proceedings on the following pages:

1. On 16 January 1996 as per p. 1 of the Records of Appeal, the unamended charge was not explained to the accused.
2. On 16 June 1996 as per p. 2, again the charge was not explained.
3. On 4 May 1997 when the first amended charge was read as per pp. 4 and 5 of the Records of Appeals, again there was an omission to explain the charge.
4. The culmination being the omission to explain at p. 103, when the second and final amended charge was read out to the appellant.

Having pondered on the issue before me, compounded by the facts and circumstances surrounding it, I concluded without hesitation that the presiding judge's reason of omission, regardless of her irreverence of the provision was irrelevant for my consideration. What was paramount was whether the non-compliance of an ingredient in s. 173(a) of the Criminal Procedure Code, in the circumstances of the case was fatal for the prosecution, and for no fault of the latter the court's finding be set aside and a retrial ordered, or an outright acquittal be granted. In support of an outright acquittal the appellant referred to a few authorities, *inter alia*, the above *Hari Ram Seghal v. Public Prosecutor* and *Jaafar bin Abu & Anor v. Public Prosecutor (supra), Wong Poh Ching v. Public Prosecutor (infra), Chua Ah Gan (f) v. Public Prosecutor (infra), Yeo Sim Huat v. Public Prosecutor (infra), Subramaniam & Anor v. Public Prosecutor (infra), Chai Chin Fatt v. Public Prosecutor (infra), Lee Swee Tee v. Public Prosecutor (infra), Singah Mohamed Hussin v. Public Prosecutor (infra)* and *Public Prosecutor v. Mohd. Fuzi b. Wan Teh & Anor (infra).* The learned Deputy Public Prosecutor did not supply me with any authorities, but instead preferred to merely refer to the appellant's authorities, and exploit them for his benefit. I must commend that he managed a sterling job out of that exercise.

To ensure minimum of confusion in this judgment, I have decided to touch on the cases referred by the appellant first, followed at its wake by the other considerations, before arriving at any definite conclusion. In spite of the persuasiveness of the precedents supplied by the appellants, I must at the outset state that the facts in those cases are distinguishable with the current one in many ways than one. In the case of *Chua Ah Gan (f) v. Public Prosecutor* [1958] *July liv,* the main substance of the appeal pertained a conviction that was largely based on hearsay evidence, compounded further by the non-recording by the presiding judge of whether the appellant understood the charge. Interestingly enough, Hepworth J when commenting on the recording of that requirement, construed such act of recording as a matter of practice and no more. In *Yeo Sun Huat v. Public Prosecutor* [1961] 27 MLJ 328, the brief facts showed that no consideration was given by the court regarding the manner the charge was read out or whether it was explained to the appellant. Instead emphasis was laid on the issue of the conviction being founded on a qualified plea of guilt. In *Subramaniam & Anor v. Public Prosecutor* [1976] 1 MLJ 76 the flaw was more serious, in that even though there were two accused persons, the court failed to read and explain the charges separately to them, an irregularity construed by Ajaib Singh J as being incurable under s. 422 of the Criminal Procedure Code. *Chai Chin Fatt v. Public Prosecutor* [1984] 2 MLJ 84 had a totally different problem. In that case the appellant was charged jointly with another person. Both of them had pleaded guilty. According to the records, on 21 March 1983 an accused person had pleaded guilty but the learned magistrate had failed to record the name of that person. Due to the doubts as to whether it was the appellant or the other person who had pleaded guilty on that fateful day, the court saw it fit to set aside the conviction and hence the retrial. Again the emphasis was not on the issue of lack of explanation. In *Lee Swee Tee v. Public Prosecutor* [1960] 26 MLJ 161, the appellant was acquitted not because the amended charge was not read out and explained to him, but primarily on the premise that the amended charge had borne out a charge that disclosed no known offence. In *Singah Mohamed Hussin v. Public Prosecutor* [1973] 2 MLJ 109 we see an overzealous magistrate amending the charge but failing to read and explaining it as required by s. 158 of the Criminal Procedure Code. Syed Othman J had no compunction in stating that the flaw was incurable and henceforth had ordered a new trial. *Public Prosecutor v. Mohd. Fuzi b. Wan Teh & Anor* [1989] 2 CLJ 652 is inapplicable to the current case, be it for analogy purposes or for any reason, as the facts were totally distinguishable. Even the appellant's counsel merely paid lip service to it.

I would like now to zero in on the pertinent issue of whether the word "shall", as promulgated in s. 173(a) of the Criminal Procedure Code, is mandatory or directory in nature. I believe much will depend on the presented facts and or situation of the case in question. Indisputably the Sessions Court judge here had somehow failed to minute, or for that matter had consciously omitted to explain the charge. She somehow made amends when she recorded that the appellant had understood the charge. The requirement of whether an accused person understands the charge, oddly enough, is not a requirement of the law. Understanding, as required by s. 173 with particular reference to sub-para. (b), is demanded by Parliament only as regards the plea, and even that if the accused person had pleaded guilty. Viewing the matter from the perspective of an accused person, had he entered a plea of guilt without understanding the charge, and without any explanation being offered, undoubtedly a case of having been prejudiced could easily have been accepted. In such an instance the court must shoulder that responsibility of avoiding any injustice.

Taking a step further, and by analogy I would like to advert to s. 158 of the Criminal Procedure Code that possesses somewhat similar ingredients and expectations, with the provision under discussion. Section 158 reads:

> (1) Any court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read **and explained to the accused** (emphasis mine).

The above provision of s. 158(2) provides that in the event of any court making certain changes, the court is required to read and explain that alteration or addition to the accused person. The above provision is wide enough to cover a situation where the court substitutes the section for which the accused is charged, and or add more charges to the existing one. It does not restrict the powers of the court merely to cosmetic matters. Likewise, as found in s. 173(a), the mandatory word of "shall" has also been adverted to by the Legislature. In the case of *Hee Nyuk Fook v. PP* [1988] 2 MLJ 36, the Supreme Court had the opportunity to have the above-mentioned s. 158 discussed before it, with particular emphasis on that impugned terminology of "shall" found in sub-s. (2). Syed Agil Barakhbah SCJ when delivering the judgment of the court related:

> Applying the test to the facts and surrounding circumstances of case, we hold that in so far as this case is concerned, the provision of section 158(2) is not imperative but directory. The provisions contained therein only lay down a rule of trial.

Following the same argument, and applying the test to the facts and surrounding circumstances of the current case, clearly it was not mandatory for the learned Sessions Court judge to explain the charge to the appellant. No hard and fast rule is to be laid down merely from the use of the word "shall" in s. 173(a) of the Criminal Procedure Code.

Additional to the above reasoning I feel further vindicated by the presence of s. 422 of the Criminal Procedure Code that reads:

> 422(1) Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
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> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment, or other proceedings before or during trial or in any enquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

Murray-Aynsley, J in *Tong Ke Kee v. Public Prosecutor* [1941] 10 MLJ (FMSR) 139, when discussing the above section had occasion to remark that, before any matter could come within its scope, the court must first consider that what was complained of must be an irregularity as distinct from an illegality. In *Pulukuri Kotaya & Others v. Emperor* [1947] AIR PC 67, Sir John Beaumont reasoned that a trial that was conducted in a manner different from that prescribed by the Code was bad, and no question of curing an irregularity arose. As the word "irregularity" has not been defined anywhere in the Code, it is thus necessary to assess the effect of that departure as imposed by Parliament on the appellant. It is the basis of the judicial system that any departures from any mandatory provision that is grave, amounting to a violation of the principles of justice, will immediately vitiate a trial. If, as in this case the court is called upon to peruse the facts and circumstances of the case, and indeed the accused person was prejudiced, then again the conviction must be quashed. Where breaches have occurred but have not occasioned any failure of justice, then such acts are curable as envisaged by s. 422. To summarise, if a trial has strayed substantially from the prescribed procedure, let alone if a failure of justice has been occasioned, then no amount of submission will succeed in swaying the court to believe that a mere irregularity has occurred.

Before I conclude, it is necessary for me to make certain minor assessments not only on the events that took place in court, but also the background of the appellant. It is indisputable that the appellant was not ill represented as she was represented by two eminent counsel at the relevant date. Her counsel could immediately rectify any misunderstanding or lack of comprehension that could pervade her mind if and when necessary. In the case of *Wong Poh Chin v. PP* [1959] MLJ 160 at para. 3 p. 161, on somewhat similar issue, the court had occasion to opine:

> I am to some extent fortified in that view by the fact that at the trial, he was represented by experienced counsel and I have no doubt that if counsel had felt in the slightest way embarrassed by the wording of the charge, he would have made some point of it in the course of the trial.

In the unlikely event of no advice having been forthcoming from the appellant's counsel, at the stage when she claimed trial, the appellant certainly could not claim that she was a simpleton who had scant knowledge of the law. The facts revealed that she was a former member of the State Legislative Assembly, a former lawmaker, and thus no ordinary citizen. A person with such a background and intellectual faculties would certainly not be lost in courts. The absence of explanation of the charge here, after due consideration, did not affect the rights of the appellant in any unjust manner, more so when she had opted to claim trial to the charge. As the case laboriously trudges on, with every unfolding of the available evidence, any possibility of not understanding the charge will surely dissipate, more than ample to substitute the lack of explanation at the opening stage. As it were, as it had been recorded that the accused had understood the charge, it is safe to conclude that the latter had somehow managed to comprehend the ingredients and particulars, without the benefit of any explanation from the court, and without the necessity of the unfolding of the evidence. Without sounding repetitive, after having perused all the above factors, I have no hesitation in construing that the omission to explain the charge here was a curable irregularity with the appellant not having been deprived of a fair trial. With no failure of justice having been occasioned I see no reason why the learned Sessions Court judge's decision should be set aside, primarily on this preliminary point.

The last, though no less equally important, was the objection that the conviction was founded on a charge unknown in law. The correct charge for purposes of this case according to the counsel of the appellant was s. 415 of the Penal Code. He ventilated that s. 417 was a punishment provision.

At the onset I must state that s. 415 is a definition and not a substantive section under which a person may he charged (*Penal Law of India* vol. Iv Dr. Sir Hari Singh Gour pp. 3516 and 3524). Section 417 punishes simple cases of cheating (*Laws of Crimes* by Ratanlal) as compared to s. 420 which is reserved for more serious cases, particularly where delivery of property has taken place, or other outcomes as specified in the latter section have been established. So long as the prosecution can prove that:

(a) the representation made by an accused person is false;

(b) the accused knew that the representation was false at the very time it was made;

(c) he made the false representation with the dishonest intention of deceiving the person to whom it was made; and

(d) he thereby induced that person to deliver any property or to do or to omit to do something which he would otherwise not have done or omitted,

it is not prevented from charging an accused person for a case of simple cheating (*Khoo Kay Jin v. Public Prosecutor* [1964] 30 MLJ 22). As there is no necessity for me to comprehensively discuss ss. 415 and 417, they being too obvious for comfort, apart from wishing to avoid going into the merits of the case at this preliminary stage, suffice if I merely declare that this second ground of objection be rejected too.